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Constitutional Law--Sunday Closing Laws--Validity Sustained

Forest Jackson Bowman
West Virginia University College of Law

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“been at pains to assign other bases for the validity of legislation” based predominantly on aesthetic considerations.

Aside from the very important consideration of protecting personal property rights, discussed in Judge Haymond’s dissent, the difficulty of legislating to promote the aesthetic is made clear in *City of Youngstown v. Kahn Bldg. Co.*, 112 Ohio St. 654, 148 N.E. 842 (1925), where the court points out that some legislatures may prefer jazz, posters, and limericks to Beethoven, Rembrandt and Keats and there might never be any agreement as to the public’s aesthetic needs.

By adhering to the general rule, the West Virginia Court retains the power to strike down acts of some future jazz and limerick loving legislature without the necessity of overruling a decision if there seems to be extreme abuse of the regulation of property for aesthetic reasons. At the same time the flexibility necessary to and inherent in the police power is retained.

Herbert Stephenson Boreman, Jr.

Constitutional Law—Sunday Closing Laws—Validity Sustained

In four recent cases from three states the Supreme Court of the United States has sustained Sunday observance laws as constitutional. In Maryland, in a state court case, *Ds*, employees of a discount department store, were convicted of violating Sunday closing laws. *Ds* appealed on the grounds that the laws were in violation of constitutional guarantees of freedom of religion, equal protection, and due process. *McGowan v. Maryland*, 81 Sup. Ct. 1101 (1961). In a Massachusetts case *P*, a super market, sought to enjoin enforcement of a Sunday closing law on the grounds that it was a statute respecting the establishment of religion or prohibiting the free exercise thereof and violating the equal protection clause of the fourteenth amendment. The United States District Court of Massachusetts held that the laws were unconstitutional and the case was appealed. *Gallagher v. Crown Kosher Super Market, Inc.*, 81 Sup. Ct. 1122 (1961). In one Pennsylvania case, *P*, a discount department store, brought an action to enjoin the enforcement of a Sunday closing law on the grounds that it was violative of the constitutional guarantees of equal protection and religious freedom. The United States District Court for the Eastern District of Pennsylvania

denied relief and *P* appealed. *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 81 Sup. Ct. 1135 (1961). In another Pennsylvania case, *Ps*, retail merchants of clothing and home furnishings, sought to enjoin the enforcement of the Sunday closing law, contending that it was a law respecting the establishment of religion, that it violated the equal protection clause of the fourteenth amendment, and that it interfered with the free exercise of *Ps*' religion. The United States District Court for the Eastern District of Pennsylvania dismissed the complaint and *Ps* appealed. *Braunfeld v. Brown*, 81 Sup. Ct. 1144 (1961). *Held*, Sunday closing laws sustained in all four cases as constitutional. While early Sunday legislation may have been predicated on religious basis, the statutes of these three states today are considered to be secular. A law designating Sunday as a day of rest for all citizens does not violate the establishment of religion clause so long as the purpose of such law is secular.

The observance of Sunday as a day of rest is a custom dating into antiquity. As early as 312 A. D. Emperor Constantine of Rome issued an edict commanding judges and inhabitants of the cities to rest on the "venerable day of the sun." *Commonwealth v. Pedano*, 33 Pa. D. & C. 551 (1938).

In Gaul, by decrees dated 585 A. D. and 596 A. D., the Merovingian kings forbade Sunday labors and Charlemagne in 813 A. D., prohibited buying and selling on Sunday. About 691 A. D. the Anglo-Saxon king, Ina, issued a strong decree making Sunday a day of rest as concerned ordinary labor. Cromwell's Parliament, in 1656, passed an act forbidding the sale of articles on Sunday and, in 1676, the statute, 29 Charles II, c. 7, which is still the basic Sunday law of Britain was enacted. It provided in part that no person should do "any worldly labour or business or work . . . upon the Lord's day," works of necessity and charity excepted and forbade the exposing for sale of merchandise on Sunday. Virginia issued the first Sunday legislation in what is now the United States by an act in 1610 which provided for attendance at Sabbath services, imposing the death penalty for the third offense. The Puritans followed the precedent of the law of Charles II, going even further in the stringency of observance required and penalties imposed. By the outbreak of the Revolution, some form of Sabbath law was enforced in all of the American Colonies. JOHNSON & YOST, *SEPARATION OF CHURCH AND STATE* 220-24 (1948).

The language of the early courts in construing Sunday laws as laws of a religious nature is unmistakable. Where Sunday laws were upheld, the "immorality," "vice," and "sin" consisted not in the acts themselves but in the doing of them on Sunday. The object of Sunday laws was clearly the enforcement of the fourth commandment. *Brimhall v. Van Campen*, 8 Minn. 1 (1858); *Judefind v. State*, 78 Md. 510, 28 Atl. 405 (1894).

An abundance of concern for the separation of church and state has caused an abandonment of such interpretations of Sunday laws and given rise to the explanation that the object of Sunday laws is the preservation of good morals and the securing of a day of repose and quiet for the people. Sunday laws are held to be, not religious, but civil regulations, based on a public policy that recognizes the need for one day of rest in seven. That this day chosen by legislatures to be a day of rest is also of religious significance to the predominant Christian sects does not make such a statute unconstitutional. Sunday has for the legislatures and courts a different significance, not involved with the legislating of morals but founded on concern for the public welfare. *State v. Malone*, 238 Mo. App. 939, 192 S.W.2d 68 (1946). This is the theme on which the instant cases were decided, the Court holding in *Gallagher v. Crown Kosher Super Market*, 81 Sup. Ct. 1122, 1127 (1961), that Sunday laws were not laws respecting the establishment of religion as they have been "divorced from the religious orientation of their predecessors."

Sunday laws have been challenged as being in violation of due process. Litigation of this sort, such as in the instant cases, is based on the contention that classifications concerning which commodities may or may not be sold on Sunday are without rational and substantial relation to the object of the litigation. Such contention has generally been denied as in the instant cases. *Ness v. Supervisors of Elections*, 162 Md. 529, 160 Atl. 8 (1932); *People v. Freedman*, 302 N.Y. 75, 96 N.E.2d 184 (1950). However, the contrary result has been reached in some cases. *Mt. Vernon v. Julian*, 369 Ill. 447, 17 N.E.2d 52 (1938). The rule seems to be, according to the instant cases, that, while the due process clause does not require a legislature to achieve symmetry in the pattern of inclusion and exclusion, the classifications must rest upon real differences. *Gallagher v. Crown Kosher Super Market*, 81 Sup. Ct. 1122, 1126 (1961).

Sunday laws have also been attacked as violations of the equal protection clause or as being prohibitive of the free exercise of religion in that one who observes a day other than Sunday as the Sabbath must also refrain from business on the first day of the week. This objection has been removed in twenty-three of the states by statutory provisions excepting those who conscientiously observe another day as the Sabbath from the execution of the Sunday laws. These statutes, unnecessary now in light of the instant cases, generally carry with them provisions that those excepted from the Sunday law may not disturb others who keep Sunday as a holy day and some allow only certain kinds of activity by Sabbatarians or restrict such activity to certain hours. See the statutes listed in the appendix to the concurring opinion, 81 Sup. Ct. 1153, 1201 (1961).

In those states which do not provide exceptions for observers of other days, Sunday laws have nonetheless generally been upheld as constitutional. It is held that such burdens as may be placed on those who do not observe Sunday are no different than those placed upon others in exactly the same situation. Equal protection is not denied nor is the free exercise of religion being prohibited when the law applies to any other person under similar circumstances and conditions. *Tinsley v. Anderson*, 171 U.S. 101 (1898). Conscientious scruples do not relieve the individual from obedience to general law which is not aimed at the promotion or restriction of religious beliefs. *Arrigo v. City of Lincoln*, 154 Neb. 537, 48 N.W.2d 643 (1951).

In the instant cases Mr. Justice Brennan and Mr. Justice Stewart dissented in two decisions and Mr. Justice Douglas dissented in all four decisions. The dissenting opinions contend that the constitutional ban against laws respecting the establishment of religion extends to protect citizens against any law which selects any religious custom or practice, puts the force of the government behind it, and penalizes persons for not observing it. The dissenting opinions express the belief that Sunday laws are just such a violation of the establishment clause of the Constitution. They contend that the economic pressures caused by Sunday closing laws prohibit the free exercise of religion by those celebrating a day other than Sunday as the Sabbath. *McGowan v. Maryland*, 81 Sup. Ct. 1101, 1218 (1961).

West Virginia's Sunday law, found in W. VA. CODE ch. 61, art. 8, § 17 (Michie 1955), prohibits laboring at any trade or calling

except household or works of necessity or charity and provides a fine of not less than ten dollars upon conviction. Section 18 makes provision for the exclusion from section 17 of "any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath and actually refrains from all secular business and labor on that day." W. VA. CODE ch. 61, art. 8, § 18 (Michie Supp. 1959).

While the West Virginia Sunday law appears never to have been tested on constitutional grounds, the West Virginia Supreme Court intimated by dicta in *State v. Baltimore & O. R.R.*, 14 W. Va. 362 (1884), that the West Virginia Sunday law was not intended to enforce the observance of Sunday as a religious duty and, hence, was not a law respecting the establishment of religion. While this appears to be the only judicial pronouncement on the constitutionality of West Virginia's Sunday law, the decisions in the instant cases would seem to remove any doubt as to constitutionality. The Virginia Supreme Court, relying upon the instant cases, has already handed down a decision holding Sunday laws to be constitutional. *Mandell v. Haddon*, 121 S.E.2d 516 (Va. 1961).

Nothing really new has come forth from the Court in these four decisions. They merely affirm the majority position developed in this country with reference to Sunday laws. Sunday laws are to be upheld, it would appear, not as laws of religious significance, but as a proper exercise of the police power of the state in providing for and safeguarding the health and welfare of the people.

Forest Jackson Bowman

Constitutional Law—Unlawful Search and Seizure—Evidence Obtained Thereby Not Admissible in State Courts

Three police officers, looking for a person wanted in connection with some local bombings, approached *D*'s residence and were refused admission without a search warrant. The policemen later returned and forcibly gained admittance. *D* was then taken forcibly upstairs where the police, in their search, found some obscene materials. *D* was ultimately convicted for possession of these materials. At the trial no search warrant was produced, nor was the failure to produce one explained. The Ohio Supreme Court ruled that, even if the evidence was unconstitutionally obtained it